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# Recent Decisions

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# RECENT DECISIONS

ATTORNEYS—SOLICITATION OF BUSINESS—UNETHICAL ASSOCIATION OF COMMERCIAL ENTERPRISE WITH PRACTICE OF LAW.— *In re Miller,* 7 Ill. 2d 443, 131 N.E.2d 91 (1955). The Chicago Bar Association charged Theodore Miller, an attorney, with violations of the Canons of Professional Ethics of the American Bar Association. It was alleged that Miller had exploited his commercial trademark service to procure clients for his legal practice. Specifically it was charged that the attorney had made a policy of providing legal interpretations of trade-marks, furnishing opinions as to the legal status of the marks, and offering to institute legal proceedings for clients of the trade-mark service, and that he had charged fees for the legal services provided. The Committee on Grievances and the Board of Managers of the Chicago Bar Association recommended that the attorney be suspended from the practice of law.

On review, the Supreme Court of Illinois was faced with the problem of deciding whether the attorney's commercial business was carried on so as to constitute a medium for his legal services. The court approved the recommendation of the grievance committee, and ordered a one year suspension, concluding that by merging the legal and commercial businesses, the attorney had conducted the commercial business in such a manner that it was in effect providing legal services in violation of the Canons of Professional Ethics.

The courts have always assumed and maintained a large degree of regulation and control of attorneys, since upon admission to the bar, lawyers become officers of the court and are accountable to the court for professional misconduct. *In re McBride,* 164 Ohio St. 419, 132 N.E.2d 113 (1956). The action of a court in exercising its power of disbarment or suspension is of a judicial nature. The inquiry has the character of an investigation, and it is not the trial of an action at law. *Braverman v. Bar Ass'n,* 121 A.2d 473 (Md. 1956). Courts universally hold that disbarment proceedings are not designed as a penalty or punishment, and should not be considered as criminal proceedings. They merely revoke a formerly granted permit to practice as an attorney, because the offender has shown himself unfit to be entrusted with the duties belonging to the office of an attorney. The primary purpose is to protect the public. *Application of Harper,* 84 So.2d. 700 (Fla. 1956).

The Canons of Ethics of the American Bar Association were drafted in 1908. The relevant section of the code in the instant case was Canon No. 35, as amended in 1933, which reads in part:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.

However, the canons should not be understood as prohibiting all business activity. A member of the bar is free to engage in commercial endeavors, and even to advertise such independent enterprises in normal business fashion. Thus, where an attorney conducted an automobile association and furnished to members a list of attorneys, whom the members could engage, but also permitted them to employ unlisted attorneys, it was held not to be the practice of law and therefore was acceptable. *In re Thibodeau,* 295 Mass. 374, 3 N.E.2d. 749 (1936).

The courts are forced to make fine distinctions in determining the propriety or impropriety of a lawyer's outside enterprises. The danger to be averted is pointed out in DRINKER, LEGAL ETHICS (1953), at 221-22:

> Where, however, the second occupation . . . is one closely related to the practice of law, and one which normally involves the solution of what are essentially legal problems, it is inevitable that . . . the lawyer will be confronted with situations where . . . he will violate the spirit of the Canons. . . .

This practice is known as the "one package system," where a transaction involving both commercial and legal considerations is done for a single fee by a lawyer who owns the business enterprise. In *In re L.R.*, 7 N.J. 390, 81 A.2d. 725 (1951), the attorney, who owned a realty corporation, directed his agents to tell customers that the corporation would do everything from securing the mortgage to turning over the deed, because the respondent was a lawyer and could handle everything. In imposing a month's suspension, the court condemned the "one package system" as throwing the practice of law into a commercial atmosphere, which is wholly foreign to the concept of acceptable practice.

When faced with the problem of commercial advertising, as in the present case, the courts do not hesitate to impose a penalty where violations of the Canons are present. In *Libarian v. State Bar,* 21 Cal. 2d. 862, 136 P.2d 321 (1943), the respondent attorney was engaged in making out income tax returns and notarizing. He posted signs listing the services, the various prices, and referred specifically to his position as an attorney. The court denied respondent's contention that he could advertise anything distinct from his legal work in any way he deemed expedient. Although respondent was engaged in a distinct business, the court reasoned

that he was still performing it as an attorney, regardless of whether the work could have been done by one licensed in a different profession. Respondent was suspended for three months. Disregard of the court's mandate to remove the signs resulted in another proceeding, wherein respondent was suspended for one year. *Librarian v. State Bar,* 25 Cal. 2d. 314, 153 P.2d. 739 (1944).

The case of *In re Rothman,* 12 N.J. 528, 97 A.2d. 621 (1953), concerned two attorneys who controlled a mortgage corporation. They were charged with violation of the canons on the grounds that their emphasis on the corporation's "speedy service," due to the merging of the law and mortgage business under one roof, had resulted in a substantial amount of legal business accruing to them. The court, in a four to three decision, held that the attorneys were guilty of soliciting professional employment. It quoted Opinion No. 57, Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association (1932), which states in part:

> It is not necessarily improper for an attorney to engage in a business; but impropriety arises when the business is of such a nature . . . as to be inconsistent with the lawyer's duties as a member of the Bar. Such an inconsistency arises when the business is one that will readily lend itself as a means for procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law.

In rejecting another defense upon which the attorney relied, the court stated, at 97 A.2d 631, that the mere fact an attorney is no longer practicing law does not relieve him of the responsibility of complying with the Canons of Professional Ethics, since those obligations are binding as long as the party is a member of the bar.

The American Bar Association, in Opinion No. 152, Opinions of the Committee on Professional Ethics and Grievances (1936), stated that a lawyer, even though registered as a patent lawyer, may not engage in the solicitation of professional employment in patent and trade-mark matters by advertisement, interviews, or personal communications, if such are not warranted by personal relations. The New York County Lawyers' Association, Committee on Professional Ethics, in Question No. 332 (1933), considered a case where an attorney, through advertising for trade-mark registration employment, attracted clients who subsequently asked that he render professional services for them when they learned he was also a lawyer. The committee disapproved, saying that such advertising in the manner of a layman which resulted in rendering legal service for the trade-mark clients was not professional conduct.

Public policy reasons dictate this rule of complete separation of business and legal interests. It has been advocated and followed, in one form or another, from the time of the Inns of Court. No other rationale can be found. However harsh and unreasonable it may seem, this rule, and others like it, are to be credited with the esteemed position which today's lawyer holds in our society.

*John F. Murray*

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COURTS—REVIEW OF STATE DECISIONS BY SUPREME COURT— REFUSAL OF STATE COURT TO FOLLOW MANDATE ON REMAND.—*Naim v. Naim,* 197 Va. 734, 90 S.E.2d 849, *motion to recall denied,* 350 U.S. 985 (1956). Plaintiff, a Caucasian woman, brought suit for annulment of her marriage to defendant, a Chinese man. Plaintiff was a resident of Virginia and defendant was a nonresident at the time the suit was instituted. There existed, at the time of marriage, a Virginia statute forbidding miscegenation. VA. CODE § 20-54 (1950). The parties, cognizant of this statute, left Virginia to be married in North Carolina and returned to Virginia immediately thereafter. Action for annulment of the marriage was brought under the Virginia statute. On trial the annulment was granted and the decree was affirmed by the Supreme Court of Appeals of Virginia. *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749 (1955). Defendant appealed to the Supreme Court of the United States, alleging the statute to be a violation of the equal protection provision of the fourteenth amendment. U.S. Const. Amend. XIV, § 1. The Supreme Court, in a per curiam decision, vacated the judgment below and ordered the matter remanded to the Virginia court so that the cause might be returned to the trial court for further findings which would enable an adjudication of the issue of the constitutionality of the miscegenation statute. *Naim v. Naim,* 350 U.S. 891 (1955).

On remand, the Supreme Court of Appeals of Virginia refused to follow the mandate of the Supreme Court of the United States, alleging that no power existed under the Virginia statutes to send a cause back to the trial court with directions to reopen the matter, gather additional evidence, and render a new decision. The court reaffirmed the previous decision below, stating the record was adequate to decide the issues presented at the trial court and on appeal.

On subsequent appeal back to the Supreme Court of the United States, the Court denied defendant's motion for recall of remand and a hearing on the merits, or in the alternative, for recall and amendment of the remand order, saying, 350 U.S. 985, "The de-

cision of the Supreme Court of Appeals of Virginia . . . in response to our order . . . leaves the case devoid of a properly presented federal question."

The basic controversy in the principal case involves one of the less familiar questions of accommodating state sovereignty to a federal system of government. When the Constitution was propounded as the supreme law of the land, and the Supreme Court, under the guidance of John Marshall, began to spell out its implications, adverse repercussions were felt on the state level.

*Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), represents just such a reaction. Preceding the principal case by 140 years, and decided by the same Virginia court, it brought to the fore the conflict between the courts of the sovereign states and the federal government. The trial court's decision was reversed by the Supreme Court of Appeals of Virginia, *Hunter v. Fairfax's Devisee,* 15 Va. (1 Munf.) 218 (1810), and was brought before the Supreme Court of the United States on appeal. The Supreme Court reversed and remanded, ordering entry of judgment as prayed. *Fairfax v. Hunter,* 11 U.S. (7 Cranch) 602 (1813). The state court refused to follow the mandate, claiming the matter was not within the purview of the Supreme Court's powers of adjudication. *Hunter v. Martin,* 18 Va. (4 Munf.) 1 (1813). It stressed the federal-state dichotomy and claimed that jurisdiction over the subject matter involved was not within the enumerated powers of the Supreme Court but rather inhered in the residual powers of the state. In considering the subsequent writ of error, the Supreme Court of the United States reasserted its jurisdiction and simply affirmed the decision of the trial court, thereby by-passing the recalcitrant state court of appeals.

Although the federal powers of appellate review have been exhaustively probed and queried, there still occur situations wherein, as in the principal case, a Supreme Court mandate on remand is not followed. Few cases, however, have approached the obvious attempt of the Virginia court in the principal case to avoid the judgment of the Supreme Court of the United States. Rather, the courts have tended to circumvent the effect of the mandate by offering some nebulous justification for avoiding it.

In *Georgia Power Co. v. Decatur,* 181 Ga. 187, 182 S.E. 32 (1935), *aff'd.,* 297 U.S. 620 (1936), it was held that the Supreme Court had misconstrued the state court's interpretation of the governing statute. The state court thereupon proceeded to reinterpret its former opinion which had been overruled by the Supreme Court. It did not purport to defy the Supreme Court but said that the latter had misapprehended the state court's opinion and, therefore, it was not bound by the decision. In affirming the

state court's decision on remand, the Supreme Court held that the state court was within its powers in reinterpreting the state statute in question and that no deprivation of any federal right occurred as a result of such reinterpretation.

Perhaps the most daring challenge to the appellate jurisdiction of the Supreme Court since *Martin v. Hunter's Lessee, supra,* was made by the Supreme Court of Nebraska in *Johnson v. Radio City WOW,* 146 Neb. 429, 19 N.W.2d 853 (1945), where that court defined the sovereignty and supremacy of the state and federal courts in their respective jurisdictions. It denied the power of the Supreme Court to adjudicate matters of essentially state interest and importance, and maintained the independence and power of state tribunals to adjudicate matters according to state law. The thrust of this decision inheres in the treatment of the mandate of the Supreme Court. The state court held that the decision of the Supreme Court was *purely advisory* and was not mandatory upon the state tribunals.

A few months later, in *Hawk v. Olson,* 146 Neb. 875, 22 N.W.2d 136 (1946), the Nebraska court held that the state court is the ultimate authority in the determination of the extent and adequacy of its judicial remedies. The Supreme Court on appeal had reversed and ordered the issuance of a writ of habeas corpus. 326 U.S. 271 (1945). On remand, the state supreme court refused to comply, saying that the writ could not issue under state law unless the proceedings were void for lack of jurisdiction, a situation not presented by the case then before the court.

In a case very similar to the *Johnson* case, *supra,* the Florida supreme court, on remand with a mandate from the Supreme Court for a "reconsideration," adhered to its prior determination, on the basis that it found support in the earlier deliberations of the Supreme Court, which were uncontradicted by more recent holdings. The Supreme Court of the United States subsequently denied certiorari for the reason that the judgment below was based upon a nonfederal ground adequate to support it. *Rice v. Arnold,* 54 So.2d 114 (Fla. 1951), *cert. denied,* 342 U.S. 946 (1953).

Finally, in 1954, the Georgia court, in *Williams v. State,* 211 Ga. 763, 88 S.E.2d 376 (1955), *cert. denied,* 350 U.S. 950 (1956), evaded the effect of the Supreme Court's mandate for reconsideration by declaring that the motion for a new trial had not been seasonably made, and therefore could not be granted according to state law, the Supreme Court's construction of the latter to the contrary notwithstanding.

The cases wherein the Supreme Court's mandate has not been followed present no apparent trend of legal thought. The Supreme Court has repeatedly refused to call the state courts into line,

contrary to the spirit of the *Martin* case. It has preferred to recognize as controlling the legal niceties which the state courts have offered by way of explanation for their refusal to follow the Court's mandates on remand. The significance of the principal case lies in the seeming reluctance of the Supreme Court to deviate from this legalism.

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EVIDENCE—CRIMINAL LAW—ADMISSIBILITY OF EVIDENCE OF UNCONNECTED CRIMES.—*People v. Mikka,* 7 Ill. 2d 454, 131 N.E.2d 79 (1955). The defendant was convicted of armed robbery. He brings writ of error contesting, *inter alia,* that certain evidence used to convict him was improperly admitted by the trial court. This evidence was to the effect that approximately one-half hour after the robbery the defendant was seen leaving a tavern a few miles distant from the scene of the robbery. The witness testified that after seeing the defendant leave the tavern, he followed him in his automobile and was fired upon from the vehicle in which the defendant was riding. The defendant contends that this testimony was incompetent in that it merely established that the witness was fired upon and that it was in no way connected to the crime with which the defendant was charged.

The question presented to the Supreme Court of Illinois was whether this evidence of the commission of another crime, unconnected to the crime with which the defendant was charged, was properly admitted in this case.

Recognizing the general rule that evidence of other crimes, unconnected with the crime for which the defendant is being tried, is inadmissible, the court nevertheless held that the evidence of the other offense was properly admitted in this case under an exception to the general rule. This exception was stated to be that evidence of other unconnected offenses may be introduced to show consciousness of guilt on the part of the defendant.

Generally, as stated by the court in the instant case, evidence of offenses other than the offense for which the accused is on trial is inadmissible. *Railton v. United States,* 127 F.2d 691 (5th Cir. 1942). But there are several exceptions to this rule. *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (1901). The exception set forth in the instant case was recognized in *Patton v. Commonwealth,* 289 Ky. 627, 159 S.W.2d 1006 (1942). There the accused was on trial for the murder of a county officer. Upon being accosted by officers and questioned as to his presence at the scene of the homicide, the defendant resisted arrest and began firing

at the officers. The trial court allowed the evidence to be admitted as proof of the murder. The Supreme Court of Kentucky held that unqualified admission of the subsequent crime under the circumstances was prejudicial error. The jury should have been instructed that this evidence may be considered solely for the purpose of establishing guilty knowledge on the part of the defendant. The court emphasized that if the jury were not cautioned that they could consider this other offense only as evidence of knowledge of guilt, they could easily find that the killing occurred in the same manner as the subsequent offense. The courts have been careful to explain that guilt cannot be established or shown simply by proving or offering to prove that the defendant had committed other crimes, but that such evidence to be admitted must be relevant or have some degree of logical connection to the issue to be tried. See *People v. Pierce,* 387 Ill. 608, 57 N.E.2d 345 (1944).

In *Troutman v. United States,* 100 F.2d 628 (10th Cir. 1938), where default in payment to a trustee had occurred before it was charged that the defendants had formed a conspiracy to defraud security investors, the court admitted the evidence of the default in the trial for conspiracy. Evidence of the default was regarded as being relevant and tending to prove a material fact in the case even though the accused were shown to have committed the default at a time and place different from that of the conspiracy. Thus, the court upheld a second exception to the rule. The defendants had initiated a common plan embracing two or more crimes, so that proof of one tended to prove the others. The defaulted payment to the trustees was evidence that the defendants had the specific conspiratorial intent to defraud investors.

An interesting point was made in *State v. Adams,* 20 Kan. 311 (1878), where the court stated that if a prosecutor was not allowed to introduce evidence of crimes other than that for which a defendant is on trial, the defendant could destroy the amount of competent evidence against him simply by increasing his criminal offenses. In *Tresenriter v. State,* 224 Ind. 10, 64 N.E.2d 295 (1946), the Indiana court stated the rule that any offense tending to prove another offense may be admitted as evidence in a criminal case, even though it may result in another indictable charge, provided the purpose of the admission is to prove motive, intent, or guilty knowledge. This rule was followed in *Copeland v. United States,* 152 F.2d 769 (D.C. Cir. 1945, *cert. denied,* 328 U.S. 841 (1946), where the court allowed evidence to be introduced showing that the defendant had immediately shot the deceased's sister after having killed the deceased. This evidence purported to disprove the defendant's contention of self-defense and to support

the prosecution's charge of murder. The exception to the general rule was allowed to prove the necessary intent to commit the crime charged. In its opinion the court pointed out the absurdity of refusing to allow the admission of relevant events occurring before and after a homicide. The court weighed the relevancy of the evidence of the separate offense by determining if its admission would establish the intent of the criminal act.

*People v. Matheson,* 373 Ill. 374, 26 N.E.2d 465 (1940), sets forth the exception that evidence of other crimes may be admitted to establish motive. Therefore, it was proper for the trial court to admit evidence that the car in which the defendants were riding when stopped by police was stolen, and that the defendants had engaged in numerous criminal offenses. This evidence tended to prove motive for the slaying of an officer who attempted to arrest the accused. *Accord, Vann v. State,* 72 Ga. App. 301, 33 S.E.2d 742 (1945).

It is well recognized that evidence of other crimes is admissible to disprove a claim by the defendant that the particular offense for which he was indicted was committed through accident or mistake. *State v. Williams,* 111 La. 179, 35 So. 505 (1903). There an accused had burned a child's ear prior to the child's death which was caused by a beating; this evidence of cruelty was allowed to be admitted to prove the state's contention that the child was deliberately and wrongfully admonished, and that the death could not have been accidental. The objection to the admission of this evidence was overruled on the basis that it served to prove there was not an accidental homicide. *State v. Gardner,* 198 La. 861, 5 So.2d 132 (1942) (dictum), indicates that previous offenses of forgery on the part of an accused may be introduced to show that a false entry in a book was not a mistake, but that it constituted a system of wrongdoings on the part of the accused.

In *State v. Goebel,* 36 Wash. 2d 367, 218 P.2d 300 (1950), it was said that extreme care must be taken in allowing the admission of evidence of other crimes. The court stated that too often such evidence is designed primarily to arouse the passion and hate of the jurors and is not introduced solely to persuade their good judgment. However, the court said, 281 P.2d 306, that the evidence of other crimes:

> . . . where not essential to the establishment of the state's case, should not be admitted, even though falling within the generally recognized exceptions to the rule of exclusion, when the trial court is convinced that its effect would be to generate heat instead of diffusing light. . . .

Many tests have been suggested for determining the admissibility of evidence showing crimes other than the one for which the

defendant is on trial. The simplest and most reasonable test appears to be whether the offered evidence establishes an indication of guilt as to the crime charged, other than the mere bad character of the accused. The yardstick for determining the admissibility of evidence is that it must be material or related to any one issue in the case. If it is relevant it is admissible though it results in establishing the commission of, or disclosure of, a previously uncharged crime.

The courts have been traditionally cautious regarding the showing of a crime not directly connected to the crime for which a defendant is charged. The principal reasons seem to be that offenses committed prior to and subsequent to a charged offense, while not totally irrelevant, are a source of prejudice, consequently causing condemnation of the accused before all evidence of the charged offense is admitted. Further, the admissibility of other crimes forces the accused to refute evidence of a multitude of charges. Yet, the courts are in some agreement as to the major exceptions to the general rule. Any evidence of another crime, unconnected to the crime charged, may be admitted if it establishes: (1) guilty knowledge; (2) common plan embracing two or more crimes so that proof of one tends to prove the other; (3) intent; (4) motive; or (5) absence of mistake or accident. The principal case falls within the first exception. Since the shooting occurred within minutes of the actual robbery, the evidence was offered to prove that the accused fired upon the witness to avoid capture or detection. It was an objective act reflecting his consciousness of guilt.

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LABOR LAW—PORTAL-TO-PORTAL ACT—TEST TO DETERMINE COMPENSABLE ACTIVITIES.—*Steiner v. Mitchell,* 350 U.S. 247 (1956); *Mitchell v. King Packing Co.,* 350 U.S. 260 (1956). In *Steiner v. Mitchell* employees of defendant battery manufacturer were exposed to caustic and toxic chemicals throughout the working day, and were required by defendant to change clothes and shower outside working hours, with no compensation for time spent in those activities. In the companion case, *Mitchell v. King Packing Co.,* butchers in a meat shop were required to sharpen knives, before the workday started, without compensation, in a room especially provided for that purpose by defendant employer.

Both actions were instituted by the Secretary of Labor to enjoin violations of record-keeping and overtime requirements of the Fair Labor Standards Act, 52 STAT. 1060 (1938), 29 U.S.C. §§ 201-19 (1952). Defendant companies invoked the Portal-to-

Portal Act, 61 STAT. 86 (1947), 29 U.S.C. § 254 (Supp. 1955), to defeat the demand that compensation be paid for the activities involved.

The Sixth Circuit affirmed the district court decision for the plaintiff in the *Steiner* case, and the Supreme Court granted certiorari to settle the conflict as to what test should be applied in determining what are principal activities under section four of the Portal-to-Portal Act. The Court held that the activities in *Steiner* were principal activities under the Portal Act. Numerous factors were considered in reaching the decision: medical and industrial expert testimony as to the effectiveness of plant ventilation, state statutory and insurance requirements to provide clothes-changing and showering facilities, danger to employees' families from contact with work clothes, and testimony that employees were required to take a shower at the close of the workday. The Court noted that in most instances such activities would be preliminary and postliminary to the employment. However, where activities such as these were found to be an integral and an indispensable part of the employees' principal activities, they were to be considered principal activities for the purposes of the Portal-to-Portal Act.

Applying the same "integral and indispensable" test to the butchers' activity in the *Mitchell* case, the Court affirmed on certiorari the Ninth Circuit's decision for plaintiff, and held that the knife sharpening was compensable as a principal activity.

Precisely which activities are to be excluded from compensation by the Portal-to-Portal Act has not always been clear from the courts' decisions. Congress enacted the Portal-to-Portal Act to offset decisions by the Supreme Court which held that time spent in so called portal activities constituted compensable hours under the Fair Labor Standards Act. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The Portal-to-Portal Act relieves employers of liability for time spent by employees on portal activities which are not compensable by contract, custom or practice. It involves only preliminary and postliminary activities, and in no way changes an employer's liability for time spent by employees performing their principal work. 29 C.F.R. § 790.8 (1949) (Administrator's interpretation of the Portal Act).

Section four of the act provides that the employer shall not be liable under the Fair Labor Standards Act for any ". . . activities which are preliminary to or postliminary to said principal activity . . .," except where such portal acts are made compensable by ". . . express provision of a written or nonwritten contract in effect, at the time of such activity . . .," or by ". . . a custom or

practice in effect, at the time of such activity, at the establishment or other place where such employee is employed . . . ." 61 STAT. 87 (1947), 29 U.S.C. § 254 (Supp. 1955).

In determining whether a given activity escapes the exclusionary terms of the Portal Act, so that the employer will be forced to give compensation under the Fair Labor Standards Act, the initial statutory test applied by the courts is whether there are contract requirements for compensation. The contract must expressly provide that the activities in question are compensable. *Battery Workers' Union v. Electric Storage Battery Co.*, 78 F. Supp. 947 (E.D. Pa. 1948).

An employer's statement, at the time of hiring, that guards would receive an hourly rate for all work performed, was held not to be an express contract provision providing for the compensation of guards for walking to and from posts of duty, cleaning firearms and changing clothes. *Plummer v. Minneapolis-Moline Power Implement Co.*, 76 F. Supp. 745 (D. Minn. 1948). A written contract which protected all rights to compensation under the Fair Labor Standards Act did not satisfy the requirements of the Portal-to-Portal Act, since such rights to compensation have been changed by the provisions of the Portal Act. *Johnson v. Park City Consol. Mines Co.*, 73 F. Supp. 852, 857 (E.D. Mo. 1947) (dictum). Where a management representative told guards they would be required to stay in the plant during a forth-coming strike, and that during a previous strike guards had been paid for twenty-four hours work each day, this constituted an express unwritten contract for which the company was liable. *Campbell v. Jones & Laughlin Steel Corp.*, 96 F. Supp. 189 (W.D. Pa. 1951). A contract which required extra pay for overtime work of the same nature as that for which a foreman was hired was held to be an implied promise to pay for required conferences with other foremen prior to and at the close of his own shift. Though the contract coverage was only implied and not express, the activity was held compensable. *Devine v. Joshua Hendy Corp.*, 77 F. Supp. 893 (S.D. Cal. 1948). These decisions illustrate the inconsistent policy of interpretation followed by the courts when the contract exception to the Portal Act has been in issue.

The second statutory test for compensable preliminary and postliminary activities is "custom." The courts have interpreted this to mean custom within the particular plant and covering the particular employees. An allegation that there is a certain custom in the industry is not sufficient to gain compensation under the Portal-to-Portal Act. *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949).

The amount of time spent in performing activities for which

compensation is sought may be a determining factor. In *Steiner v. Mitchell*, one of the instant cases, the activities required thirty minutes per day. Other activities involving less time have been held non-compensable as de minimis. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). Where approximately ten minutes were required to change clothes, the de minimus rule was applied. *McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb. 1948). Lesser periods have generally been held not compensable. *Frank v. Wilson & Co.*, 172 F.2d 712 (7th Cir.), *cert. denied*, 337 U.S. 918 (1949) (five minutes); *Timmons v. Wagoner County Coal Co.*, 13 CCH Lab. Cas. § 64006 (E.D. Okla. 1947) (three minutes).

In order to gain compensation in a case where neither the contract exception nor the custom exception is applicable, the employee must prove that the activity for which he is seeking compensation is a principal activity, so that the Portal-to-Portal Act has no application to it. Whether an activity is principal or preliminary is a question of fact for the jury to decide. *Battery Workers' Union v. Electric Storage Battery Co., supra.*

The words "principal activities" have been construed quite liberally, ". . . to include any work of consequence performed for an employer, no matter when the work is performed." This was an interpretation of the act given by its Administrator, 29 C.F.R. § 790.8 (1949), and followed in *Tobin v. Alma Mills*, 92 F. Supp. 728 (W.D.S.C. 1950), *cert. denied*, 343 U.S. 933 (1952).

The United States Court of Appeals for the Eighth Circuit has established a distinction which is apparently in conflict with the "integral and indispensable" test used in the instant cases. In the district court compensation was denied for time spent changing clothes on the ground that in the absence of contract or custom this type of activity was covered by the Portal Act. *Ciemnoczolowski v. Q.O. Ordinance Corp.*, 119 F. Supp. 793 (D. Neb. 1954). In affirming the district court on appeal, the Eighth Circuit distinguished the facts from *Steiner v. Mitchell*, 215 F.2d 171 (6th Cir. 1954), (one of the instant cases as reported below), and concluded that there was a difference between what is necessary and what is integral, the former being present in some cases without the latter, and that necessity alone will not make work a part of the principal activity. *Ciemnoczolowski v. Q.O. Ordinance Corp.*, 228 F.2d 929 (8th Cir. 1955).

In the present cases the Supreme Court approved the standard of finding whether the particular activities were integral and indispensable to the principal work, in order to determine whether

the activities were exempt from the terms of the Portal Act. The Eighth Circuit's distinction between what is "necessary" and what is "indispensable" is too nebulous to be of any practical value and should be disregarded as contravening the policy if not the literal wording of the present decisions.

*H. Theodore Werner*

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TORTS — IMPUTED NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF CONSENT DRIVER NOT IMPUTED TO OWNER UNDER FINANCIAL RESPONSIBILITY STATUTE. — *Stuart v. Pilgram*, . . . Iowa . . ., 74 N.W.2d 212 (1956). The plaintiff's automobile, in which she was a passenger, was involved in a collision with the defendant's car, the plaintiff sustaining personal injury in addition to property damage. It was conceded that at the time of the accident, the plaintiff's car was being operated by her husband with her permission, but the court ruled it was not under her control. The controversy was governed by the Iowa "Owner Responsibility" statute. The pertinent provision reads as follows:

> In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage. IOWA CODE ANN. § 321.493 (1954).

The trial court's instruction, based upon *Secured Finance Co. v. Chicago, R. I. & P. Ry.*, 207 Iowa 1105, 224 N.W. 88 (1929), was, in essence, that any contributory negligence on the part of the consent driver was imputed to the owner as a matter of law; consequently, the jury found for the defendant.

In reversing the decision of the lower court the Supreme Court of Iowa concluded that the doctrine as stated in the *Secured Finance* case was "demonstrably unsound" both in its rationale and policy. The court held that the statute did not create a principal-agent relationship for all purposes and that the "two-way" doctrine was an "obvious non sequitur." The "two-way" doctrine states that where the negligence of the bailee is imputed to the owner in actions against the owner, it necessarily follows that such negligence is also imputed in actions by the owner. Thus, in overruling *Secured Finance Co., supra,* the court was confronted with the question of whether the contributory negligence of the consent driver is imputed to the owner under the "owner responsibility" statute as a matter of law.

The identical question was the subject of much controversy among the lower courts of New York in the interpretation of a

similar statute. N.Y. VEHICLE & TRAFFIC LAW § 59. Prior to 1940 there were several decisions in the lower New York courts holding that the contributory negligence of the bailee driver was an absolute bar to a suit for property damage by the owner against a negligent third party. In *Darrohn v. Russell,* 154 Misc. 753, 277 N.Y. Supp. 783 (City Ct. 1935), where both parties involved in the accident were negligent consent drivers and each owner claimed property damages from the other, the court held that the consent driver's negligence was imputed to the owner for all purposes. *Accord, Renza v. Brennan,* 165 Misc. 96, 300 N.Y. Supp. 221 (County Ct. 1937).

The rule followed in these earlier New York cases was abandoned in *Mills v. Gabriel,* 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), *aff'd per curiam,* 284 N.Y. 755, 31 N.E.2d 512 (1940). The court held, 18 N.Y.S.2d at 80, that the statute was "applicable . . . only in actions brought by third persons against the owner," thus overruling the principle of *Darrohn v. Russell, supra. Accord, Buckin v. Long Island R.R.,* 286 N.Y. 146, 36 N.E.2d 88, 89 (1941) (dictum); *Hessler v. Nelipowitz,* 55 N.Y.S.2d 692 (Munic. Ct. 1945).

The opposite view was expressed in *Milgate v. Wraith,* 19 Cal. 2d 297, 121 P.2d 10 (1942), where the court favored the reasoning of the lower New York courts as promulgated in *Darrohn v. Russell, supra.* The California decision, however, turned upon the language peculiar to its statute which reads that the negligence of a consent driver ". . . shall be imputed to the owner for *all* purposes of civil damages." CAL. VEHICLE CODE ANN. § 402 (Deering 1948). (Emphasis added.)

The California result has been reached where the statute expressly establishes a principal-agent relationship. In these jurisdictions the courts have adopted the rule that contributory negligence of a consent driver must be imputed to the owner under the application of common law rules of agency. Thus, in *National Trucking & Storage Co. v. Driscoll,* 64 A.2d 304 (D.C. Munic. App. 1949), the court distinguished its statute, D.C. CODE ANN. § 40-403 (1951), from the New York and Iowa statutes, pointing out that the legislature in those jurisdictions had not expressly stated that the consent driver was to be considered the owner's agent. The court said, 64 A.2d at 307-08:

> We find nothing in the act to indicate that the Congress intended that a person driving an automobile with the owner's consent is the owner's agent when the owner is being sued, but is not his agent when the owner is suing.

Rhode Island adopted the same reasoning in *Davis Pontiac v. Sirois,* 105 A.2d 792 (R.I. 1954), when interpreting R.I. PUBLIC

LAWS c. 2595, art. XIX, § 1 (1950). The Minnesota statute, MINN. STAT. ANN. § 170.54 (1945), expressly provides that the consent driver is an "agent" of the owner. But in *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943), the court construed this statute as meaning that the driver is an agent only where the owner is being sued by an injured third party and ruled that:

> The only legitimate inference permissible is that the legislative intent was to provide for financial responsibility of the bailor in favor of third parties injured by the bailee's negligence without changing the rule that a bailee's contributory negligence is not imputable to the bailor. 10 N.W.2d at 417.

Similarly, in *Westergren v. King*, 99 A.2d 356 (Super. Ct. Del. 1953), the Delaware court adopted the reasoning of the New York and Minnesota courts.

Louisiana adopted a similar view in *Di Leo v. Du Montier*, 195 So. 74 (La. App. 1940), where a provision of LA. CIV. CODE ANN. art. 2318 (West 1952), made the parent responsible for the negligence of a minor. The court ruled, without offering any reasons, that the contributory negligence of a son as the driver of an automobile precluded the father as owner from recovering property damages to his car. It must be pointed out, however, that Louisiana is not a common law jurisdiction.

The apparent conflict of authority on this point can be reconciled on the basis of the statutory language peculiar to the various jurisdictions. There is judicial harmony among those states in which the statute expressly creates an agency relationship, with the possible exception of Minnesota. However, the Minnesota statute, MINN. STAT. ANN. § 170.54, *supra*, is unique in that the title is very weighty evidence that the legislature intended the statute to be "remedial" solely in behalf of injured third parties. *Christensen v. Hennepin Transp. Co., supra.* In states where the statute is silent as to an agency relationship it is generally construed strictly so as to operate only as a remedial statute for the benefit of innocent third parties. This conclusion is based upon the theory that statutes in derogation of the common law are to be construed strictly. *Mills v. Gabriel, supra.* The Louisiana construction is not properly an exception to this theory for it is not a common law jurisdiction.

It is submitted that if the statute makes no mention of an agency relationship in the language of the statute, then the "two-way" doctrine is an "obvious non sequitur" as pointed out in the instant case. On the other hand, if the statute expressly creates a principal-agent relationship, where none had existed at common law, then the "two-way" doctrine must be applied as a rami-

fication of common law agency. Under such a statute, the owner is barred as a matter of law from recovering for either personal injury or property damage.

*John G. Curran*

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WORKMEN'S COMPENSATION—NON-OCCUPATIONAL DISEASE NOT A COMPENSABLE INJURY.—*Johnson v. Industrial Comm'n*, 164 Ohio St. 297, 130 N.E.2d 807 (1955). Plaintiff's husband, a laborer, contracted influenza as a result of working outside in cold damp weather on February 15, 1949. After a period of about two weeks the influenza developed into lobar pneumonia, from which he died on March 9, 1949. The Ohio Industrial Commission denied plaintiff's claim to benefits under the Workmen's Compensation Act, OHIO REV. CODE ANN. c. 4123. On appeal to the common pleas court, judgment was entered for plaintiff and affirmed by the court of appeals. The Industrial Commission brought this appeal to the Supreme Court of Ohio.

Since the plaintiff's right of appeal from the Commission's order did not apply where an occupational disease was involved, OHIO REV. CODE ANN. §§ 4123.51, 4123.69 (Page 1954), the court ruled that in order for the plaintiff to recover, it had to be shown that the disease came under the compensable injury provisions of the Act. OHIO REV. CODE ANN. §§ 4123.54, 4123.59 (Page 1954).

The court held that pneumonia was not a compensable injury within the purview of the Ohio statute, relying on *Renkel v. Industrial Comm'n*, 109 Ohio St. 152, 141 N.E. 834 (1923), and *Industrial Comm'n v. Cross*, 104 Ohio St. 561, 136 N.E. 283 (1922). In the latter cases, the courts had interpreted the Ohio statute to exclude non-occupational diseases from the category of "injuries" because occupational diseases were classified separately, indicating that "diseases" were distinct from "injuries."

Such a disease, said the court, cannot be a compensable injury despite the fact that it is accompanied by actual physical harm and is suddenly and unexpectedly, or accidentally, contracted. This is where the Ohio court deviates from the general opinion on this point. While most jurisdictions make similar distinctions in their compensation acts between injuries and occupational diseases, unlike the Ohio statute the acts may specify that the injury must be accidental. See, *e.g.* IND. ANN. STAT. § 40-1202 (Burns Supp. 1955); PA. STAT. ANN. tit. 77, § 411 (Purdon 1952). Consequently, decisions frequently turn on the accidental quality of the disease rather than the distinction in interpretation followed by the Ohio court.

Many courts therefore will grant or deny relief depending upon whether or not the disease was to be expected. Two Scottish cases, among the earliest decided on this subject, were resolved on this theory. In *Alloa Coal Co. v. Drylie*, 1 Scots L.T.R. 167 (1913), in 4 Neg. & Comp. Cas. Ann. 899 (1914), recovery was granted to a miner who caught pneumonia when he was compelled to work in a flooded mine, while in *John Watson Ltd. v. Brown*, 1 Scots L.T.R. 174 (1913), in 4 Neg. & Comp. Cas. Ann. 899 (n.) (1914), recovery was denied to a miner who contracted the same disease from standing in a draft while waiting for an elevator. The court ruled that since the disease in the former case resulted from an unexpected flood, it constituted an accidental injury while the draft in the latter case lacked any element of the unusual which could brand it as an accident.

In the New York case of *Lerner v. Rump Bros.*, 241 N.Y. 153, 149 N.E. 334 (1925), recovery was denied to an employee who had developed pneumonia as a result of going in and out of a refrigerator on the grounds that there was no single "catastrophic or extraordinary" event to be assigned as cause. However, such an extreme event was found to exist in *Karp v. West 21st Street Holding Corp.*, 253 App. Div. 851, 1 N.Y.S.2d 399 (3d Dep't. 1938), where recovery was granted to a cab driver who had slipped, struck his head against the car door, fallen into a puddle of water, and caught pneumonia.

Other courts employing this theory are not quite as demanding as New York, as shown by the rationale of the Colorado court in *Industrial Comm'n v. Corwin Hospital*, 126 Colo. 358, 250 P.2d 135 (1952), where recovery was granted under the accidental injury provision of the statute to a nurse who had contracted polio in the course of her duties, the court observing that, "nothing more is required than that the harm that the plaintiff has sustained shall be unexpected." Similarly, in *Roth v. Locust Mountain State Hospital*, 130 Pa. Super. 1, 196 Atl. 924 (1938), it was held that a doctor suffered a compensable accidental injury when, after extricating his car from the snow, he was compelled to perform an operation in a cold room and in a dampened condition, and contracted pneumonia. The court pointed out that it was not normal for him to operate in wet clothes and that the unusual circumstances afforded a basis for recovery.

A frequent case in which recovery is denied under this theory involves firemen who get wet on the job and contract influenza or pneumonia, the courts holding that getting wet is part of a fireman's work, and is certainly not regarded as something unusual or unlikely. *Stevens v. Village of Driggs*, 65 Idaho 733, 152 P.2d 891 (1944); *Ferris v. City of Eastport*, 123 Me. 193, 122 Atl. 410

(1923); *Landers v. Muskegon,* 196 Mich. 750, 163 N.W. 43 (1917).

A second class of cases has turned upon the "definite time and place" test, which is a variation of the test of expectancy. If the disease has developed over a period of time, no recovery is granted. If, however, the contraction can be traced to a particular time and place, it is a compensable accidental injury. Thus, where a workman incurred sciatica from working continuously in cold weather, *George A. Fuller Co. v. Schacke,* 71 R.I. 322, 45 A.2d 175 (1945), and where a repairman developed pneumonia as a result of working for eight days in a factory dampened by a flood, *Parks v. Miller Printing Mach. Co.,* 336 Pa. 455, 9 A.2d 742 (1939), recovery was denied because no specific date could be pointed to as the time of contraction of the diseases. Following this same theory, recovery was granted in *Texas Employers Ins. Ass'n v. Freeman,* 266 S.W.2d 177 (Tex. Civ. App. 1954), for an infection resulting from contact with acidified oil because the particular time, place and cause of the accident could be ascertained.

Another group of decisions has been based upon the relative risk to the workman of contracting the disease as compared with the risk to the general public, again a variation of the expectancy test. n *Pow v. Southern Constr. Co.,* 235 Ala. 580, 180 So. 288 (1938), recovery was allowed to an engineer who caught pneumonia after working long hours in a damp excavation, the court noting that the exposure was peculiar to the time and place of employment. Again, in *Warner v. Industrial Accident Comm'n,* 10 Cal. App. 2d 375, 51 P.2d 897 (1935), recovery was allowed to a border inspector who had become inflicted with pneumonia due to long periods of exposure on the Mexican border. The court ruled that this constituted a special exposure to the elements, to which the public was not subjected, and consequently was a compensable injury. In *Vukovich v. Industrial Comm'n,* 76 Ariz. 187, 261 P.2d 1000 (1953), recovery was granted where a workman who had been unloading lumber from a truck on an extremely hot day died from heat prostration. The workman, according to the court, at 261 P.2d 1003, was more exposed to injury by heat stroke than others in that locale not engaged in physical exertion of any kind.

Still other courts will rule that disease cannot constitute a compensable injury unless it can be shown that there was actual harm done to the physical structure of the body. In *Lux v. Western Casualty Co.,* 107 F.2d 1002 (5th Cir. 1939), recovery was denied a laborer who caught pneumonia while passing between the high temperature of the smoke room to the low temperature of the cooling room because there was no physical damage pre-

ceding the disease. The same approach was followed in *Costly v. City of Eveleth,* 173 Minn. 564, 218 N.W. 126 (1928), and *Maryland Casualty Co. v. Clark,* 140 S.W.2d 890 (Tex. Civ. App. 1940), where recovery was denied because there was no proof of harm to the physical structure of the body, such as an abrasion or hemorrhage, as distinguished from the disease itself.

Finally there is a group of cases which find that there is no proximate causal relationship existing between the conditions of employment and the disease contracted. In *Allith-Prouty Co. v. Industrial Comm'n,* 352 Ill. 78, 185 N.E. 267 (1933), with a factual situation similar to that in *Lux v. Western Casualty Co., supra,* recovery was not allowed because the disease could not be traced to the employment. In *Deardorff v. East Chicago,* 114 Ind. App. 102, 50 N.E.2d 926 (1943), recovery was denied because it could be shown that streptococci infection of the bloodstream could have been caused by an event outside of employment. In both *Olson v. Erickson,* 105 Colo. 489, 99 P.2d 199 (1940), and *Newkirk v. Golden Cycle Mining & Reduction Co.,* 79 Colo. 298, 244 Pac. 1019 (1926), recovery was not allowed because it could not be shown that the employment incident complained of was the proximate cause of the pneumonia for which compensation was sought.

The disease in the instant case could easily have fallen within one of these categories, for it was contracted unexpectedly; it was traceable to a definite time and place; it resulted from exposure to which the general public was not subjected; and while no damage to the physical structure was shown, there was apparent proximate causation. However, the Ohio court deemed to base its decision upon the mutual exclusiveness of the terms "injuries" and "occupational diseases" as used in the Ohio compensation act. In its effort to avoid leaving the law "in a less exact state than the decision of this case necessitates," the court adopted a standard which admits of clarity in application, but which seems at variance with the liberal interpretation usually afforded to these remedial statutes.

*John P. Callahan*

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ZONING — CONSTITUTIONAL LAW — EXTENSION OF A NONCONFORMING USE.—*Ranney v. Instituto Pontificio Delle Maestre Filippini,* . . . N.J.L. . . ., 119 A.2d 142 (1955). Respondent is an educational institution engaged in the training of teachers for parochial schools throughout New Jersey. The school was an educational institution before the passage of the 1932 zoning ordinance of the township in which it is located, which placed the area within a

large "A" residence zone. Since that time the institution has continued as a nonconforming use. Respondent, wishing to erect a new building adjacent to the present one, was denied permission to build by the building inspector, whose denial was based on the township zoning ordinance which provides:

> Any non-conforming use or structure existing at the time of the passage of this ordinance may be continued upon the lot or in the building so occupied, and any such structure may be restored or repaired in the event of partial destruction thereof but no such use or structure may be enlarged.

Thereafter respondent sought a variance from the terms of this ordinance from the board of adjustment and the township committee of the county. After three hearings, the board of adjustment recommended without dissent the granting of the variance to the township committee, which approved by concurring resolution. The committee found that: the existing facilities of respondent were inadequate for its needs; the premises were not adaptable for conforming uses due to the peculiar topography of the land; removal of respondent to another place would work a severe financial hardship; the variance "would not affect the present character of the surrounding property," nor would it result in "substantial detriment to the public good," nor "impair the intent and purpose of the zoning ordinance."

Appelants, property owners in the area, challenged the validity of this variance. The trial court upheld the grant of the variance, deeming the reasons given to justify its issuance within the statutory scope of power and consistent with the objectives of zoning.

On appeal, the Supreme Court of New Jersey was faced with the question of whether the local authorities could grant a variance to this nonconforming use under the factual circumstances described above.

The supreme court by a vote of four to three reversed the lower court's decision, holding that a variance must not issue where it will substantially thwart the zoning plan, and that a variance here would be directly antagonistic to the design and purpose of the ordinance and of sound zoning. Recognizing the more liberal view of some courts, the majority nevertheless stated that New Jersey had adopted a stricter interpretation of its zoning statute. N.J. STAT. ANN. § 40:55-48 (1940).

The dissenting opinions took the view that the majority stand embodied an "unwarranted result . . . embracing inflexible principles, which ignore the clear statutory language" and the facts of this situation; and that the New Jersey statute allows the granting of a variance, when this may be done ". . . without sub-

stantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J. STAT. ANN. § 40:55-39 (Supp. 1955). The dissenting justices believed that the facts, as found by the local authorities, and the great public service rendered by respondent warranted the granting of the variance. They strongly contended that the decision as to the granting of variances should be left to the local authorities entrusted by the legislature with this administrative function and that their decision should be upheld "in the absence of an affirmative showing that it was manifestly in abuse of their discretionary authority."

The guide the court utilized was voiced in *Sitgreaves v. Board of Adjustment,* 136 N.J.L. 21, 54 A.2d 451, 455 (1947): "The spirit of the Zoning Act, as it has properly and frequently been said by the Supreme Court, is to restrict rather than to increase any nonconforming use."

In construing zoning statutes this is the general rule. See 8 McQUILLAN, MUNICIPAL CORPORATIONS § 25.183 (3d ed. 1950). In *San Diego County v. McClurken,* 37 Cal. 2d 683, 234 P.2d 972 (1951), a strict policy against the extension and enlargement of nonconforming uses was enforced, the court saying that courts throughout the country generally follow such a strict policy, as the object of zoning is to eliminate nonconforming uses. It is to be noted, however, that the degree of strictness of this general rule varies somewhat from state to state and from one factual situation to another. See also *Edmunds v. Los Angeles County,* 40 Cal. 2d 642, 255 P.2d 722 (1953). *Thayer v. Board of Appeals of Hartford,* 114 Conn. 15, 157 Atl. 273 (1931) held that nonconforming uses not only never should be allowed to expand or enlarge, but should be reduced to conformity as completely and as speedily as possible with due regard to the interests of the user; at least there should be accomplished the greatest possible amelioration of the offending use which justice to that use permits. The same view was expressed in *Everpure Ice Mfg. Co. v. Board of Appeals,* 324 Mass. 433, 86 N.E.2d 906 (1949), where the court stated, 86 N.E.2d at 911:

> It is familiar law that the "power of variation is to be sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature, and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others."

The same strict policy is followed in Washington. *Coleman v. Walla Walla,* 44 Wash. 2d 296, 266 P.2d 1034 (1954).

However, as the dissenting opinion in the principal case con-

tended, the local zoning authorities do have discretionary powers whereby they may grant variances as exceptions to the strict general rule. In *Albright v. Johnson,* 135 N.J.L. 70, 50 A.2d. 399 (1946), the same court that decided the instant case, said, 50 A.2d at 402:

> . . . when the juridiction of the Board of Adjustment is invoked for a variance, that body exercises a quasi judicial function which is in essence discretionary, controlled by the policy of the statute and the ordinance consistent therewith.

The local board's decision as to the granting of a variance will be upheld unless it appears from the facts that the board's discretionary powers have been abused. *Stern v. Zoning Board of Appeals,* 140 Conn. 241, 99 A.2d 130 (1953); *Albright v. Johnson, supra; Gulf, C. & S.F. Ry. v. White,* 281 S.W.2d 441, (Tex. Civ. App. 1955).

Usually, the zoning ordinances and statutes provide expressly that nonconforming uses shall not be enlarged unless they are changed to conforming uses. See 8 McQUILLAN, MUNICIPAL CORPORATIONS § 25.206 (3d ed. 1950). However, again such provisions are subject to the discretion of the local authorities, and variances may be granted, if in the opinion of these authorities the facts of a particular situation warrant such a grant.

There are two views as to whether a nonconforming use may be extended over the remaining part of the total area, which was possessed by the user at the time of the passage of the ordinance but which was not actually used in conjunction with the nonconforming use. The view that the use cannot be extended is exemplified by *Dienelt v. Monterey County,* 113 Cal. App. 2d 128, 247 P.2d 925 (1952), where the court prohibited additional outdoor concrete floor space for a resort in a residential zone, and in *Martin v. Cestone,* 33 N.J. Super, 267, 110 A.2d 54 (1954), where the use of part of a tract of land for the storage of heavy equipment before the passage of the zoning ordinance, was not allowed to be extended to the remaining part of the tract. This seems the more prevalent view. The other view that the use can be extended to the remainder of the land was followed by the Pennsylvania court in *Firth v. Scherzberg,* 366 Pa. 443, 77 A.2d 443 (1951), which cites and follows *Humphreys v. Stuart Realty Corp.,* 364 Pa. 616, 73 A.2d 407 (1950).

The increasing of the size or number of the buildings of a nonconforming use may very well be denied as being a "prohibited enlargement of that use." 8 McQUILLAN, MUNICIPAL CORPORATIONS § 25.208 (3d ed. 1950). In *West Helena v. Bockman,* 221 Ark. 677, 256 S.W.2d 40 (1953), it was held that, in the exercise of

sound discretion, the city council may refuse a permit to add another room to a physician's clinic building, which was a nonconforming use in a residential district, especially when such an addition would bring the clinic closer to the adjacent building than was allowed by ordinance, and in *Gerkin v. Village of Ridgewood,* 17 N.J. Super. 472, 86 A.2d 275 (1952), the court held the same view regarding the denial of a permit to a nonconforming golf course to build a necessary clubhouse. In *Edmonds v. Los Angeles County,* 40 Cal. 2d 642, 255 P.2d 772, 779 (1953), it was regarded as well settled that a nonconforming use does not entitle the owner of the property to increase the size of his permanent buildings.

Yet the majority of the courts will often permit reasonable and normal accessory uses in connection with nonconforming uses. *Great South Bay Marine Corp. v. Norton,* 58 N.Y.S.2d 172 (Sup. Ct. 1945), *aff'd per curiam,* 75 N.Y.S.2d 304 (2d Dep't 1947). Here the court said that the keeping of the entire tract of land by the airport as one unit since prior to the passing of the ordinance gave the airport the right to erect on part of this land a building, which was to be used in conjunction with the present use of the airport, on the ground that it was a reasonable and natural accessory to that use. Similarly, in *A.L. Carrithers & Son v. Louisville,* 250 Ky. 462, 63 S.W.2d 493 (1933), it was held to be within the discretion of the board of adjustment and appeals to grant a permit to a milk plant in a residential district to extend the plant to include office space, even where the ordinance prohibited "structural alterations."

It appears that a mere increase in volume of business does not constitute an extension of the use, *Firth v. Scherzberg, supra,* nor does the mere use of improved instrumentalities, *De Felice v. Zoning Board of Appeals,* 130 Conn. 156, 32 A.2d 635 (1943); *cf. Appeal of Haller Baking Co.,* 295 Pa. 257, 145 Atl. 77 (1928). This is true provided these instrumentalities are ordinarily and reasonably adapted to make that use available to the owner, and the original nature and purpose of the use remain unchanged.

Nonconforming uses may be changed to a new and different use, but such change is only allowed to a use of the same or a higher zoning classification and never to one of a lower class. Even changing to a use of the same class will usually only be allowed if this new use is more desirable than the old one. *Board of Adjustment v. Abe Perlmutter Constr. Co.,* 280 P.2d 1107 (Colo. 1955); *Higgins v. Baltimore,* 206 Md. 89, 110 A.2d 503 (1954); *Molnar v. George B. Henne & Co.,* 377 Pa. 571, 105 A.2d 325 (1954).

The principal case, holding a strict policy against the extension of nonconforming uses, seems to express the majority view as regards general policy. It appears, however, that the dissenting opinion in the principal case is supported by the weight of authority and by the former decisions of the New Jersey Supreme Court in stating that the choice of refusing or granting the variance of the use should have been left in the hands of the local authorities, who have been entrusted by the legislature with administering the zoning statute. These local authorities are by far more familiar with the factual situation involved than are the court justices. Administrative decisions are normally subject to review by the courts to ascertain whether their discretionary powers have been abused. The courts, regardless of their state's expressed policy, have permitted the zoning boards a certain measure of discretion and individual judgment in making their decisions.

The conclusion reached by the majority of the court in the instant case indicates a formalistic adherence to the policy of restricting and confining nonconforming uses. In their zeal to promote uniformity, the majority has departed from the general practice of accepting the determinations of the local zoning boards, which, it is submitted, was a more realistic approach to the basic objectives of zoning regulation.

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